

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

**CENTURA HEALTH/ST. MARY-CORWIN
MEDICAL CENTER,**

and

Case 27–CA–216441

**COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 7774**

Jose R. Rojas, Esq., for the General Counsel.
Patrick R. Scully and Joseph Hunt, Esqs.
(Sherman & Howard, LLC), for the Respondent.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case in Denver, Colorado, on July 31, 2018. This case was tried following the issuance of a complaint and notice of hearing (the complaint) by the Regional Director for Region 27 of the National Labor Relations Board on June 13, 2018. The complaint was based on an original and an amended unfair labor practice charge filed by Charging Party Communications Workers of America, Local 7774 (the Union) on March 12 and April 19, 2018, respectively, against Respondent Centura Health/St. Mary-Corwin Medical Center (Respondent). The General Counsel alleges that Respondent violated Sections 8(a)(5) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et. seq. (the Act), by refusing to provide the Union with certain requested information. Respondent filed a timely answer denying committing any wrongdoing.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file posthearing briefs.¹ The party's posthearing briefs have been carefully considered.

¹ Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh. " for Respondent's Exhibit; "GC Br. " for the General Counsel's post-hearing brief; and "R. Br. " for Respondent's posthearing brief. Counsel for the General Counsel's unopposed motion to correct the transcript (see GC Br. at 5, fn.3) is granted and that motion is made part of the record. I also note that the transcript at p. 82, line 2 incorrectly states, "I've got a ready decision," which is hereby corrected to read, "I've got to write a decision".

Accordingly, based upon the entire record herein, including the posthearing briefs and my observation of the credibility of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Colorado nonprofit corporation with an office and place of business in Pueblo, Colorado, where it is engaged in the business of operating a hospital providing medical care to acutely ill patients. During the 12 months prior to issuance of the complaint, Respondent received gross revenues in excess of \$250,000. During that same time period, Respondent purchased and received shipped goods valued in excess of \$50,000 from outside the State of Colorado. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that, since March 12, 2018,² Respondent has failed and refused to provide 3 items of information regarding terms and conditions of nonbargaining unit employees. The Union requested this information following Respondent's announcement that it would lay off Union-represented and unrepresented employees. Respondent, in its defense, asserts that the General Counsel cannot demonstrate the relevance of the requested information based on the Board's established standard.

I note that Respondent, by its answer, asserted numerous additional affirmative defenses, but at hearing, failed to adduce evidence in support of the same. Moreover, by its posthearing brief, Respondent appears to have abandoned all defenses other than lack of relevance. See R. Br. at 14 ("[t]he only relevant inquiry is whether the Union has satisfied its burden to establish a reasonable belief supported by objective evidence for requesting the information concerning nonunit employees"). Under the circumstances, I find that Respondent has abandoned its additional affirmative defenses and will not address them further.

With respect to the credibility determinations relied upon herein, although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record. The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as having been in conflict with credited testimony or other evidence, or because it was incredible and unworthy of belief.

² Unless otherwise noted, all dates refer to the year 2018.

Factual Background

Respondent is a nonprofit organization that operates a hospital in Pueblo, Colorado. The Union, a local chartered by the Communications Workers of America (CWA or International), represents certain of Respondent’s nonprofessional employees working throughout different departments of the hospital and its adjunct facility (the bargaining unit). At all relevant times, Marcy Harris (Harris) has served as the Union’s president.³ The CWA assists the Union with contract bargaining, contract enforcement and processing of grievances. Since January 2016, Garry Jordan (Jordan), a staff representative for the International, has been tasked with assisting Harris in representing the bargaining unit with respect to contract negotiations, wage re-openers and processing grievances. (Tr. 26–32, 43.)

1. Respondent’s workforce and relevant collective-bargaining agreement provisions

The Union and Respondent are parties to a collective-bargaining agreement effective from October 1, 2017 to September 30, 2020 (CBA). In addition to the bargaining unit employees, Respondent employs two groups of unrepresented employees: regular employees who receive benefits (benefitted employees) and part-time, on-call workers called PRNs, which stands for “per requested need.” It is undisputed that PRNs, who are used to fill in for benefitted employees who are absent, are not subject to the bargaining agreement.⁴ At the time the Union made the information requests at issue here, however, PRNs were used to perform the same type of work as bargaining unit employees on an “as needed” basis. (Tr. 36, 38–39, 119, 131.)

The CBA contains lay off and recall provisions, which are set forth in Appendix A. Two articles are particularly relevant to this case. First, article 5.1 provides that, “PRN, temporary and special part-time positions will be laid off before any regular part-time or regular full-time employees.” Second, article 11 states that, “Union employees will receive the same severance as other regular non-bargaining unit employees of the Hospital capping at twelve (12) weeks.” (GC Exh. 2; Tr. 36–39.)

2. Respondent’s March 7 WARN notice and the parties’ discussion of article 5.1

On March 7, Respondent’s vice president of Total Rewards James Humphrey (Humphrey) sent the Union a notice, pursuant to the Worker Adjustment and Retraining Notification Act (WARN Act), of Respondent’s intention to eliminate certain positions at the hospital.⁵ The notice states, in relevant part:

We regret to inform you that starting on May 7, 2018 (or some time during the 13-day period thereafter), St. Mary Corwin Medical Center will permanently terminate the employee rights of certain bargaining unit employees, employed at [the hospital]. Additional employment terminations for bargaining unit

³ Harris is referred to at various points in the record by her maiden name, Marcy Vegas.

⁴ See GC Exh. 2. The CBA’s recognition clause is set forth at Appendix A hereto.

⁵ See Worker Adjustment and Retraining Notification Act of 1988 (WARN), 29 U.S.C. § 2101, et seq. The WARN Act requires covered employers who are contemplating certain reductions in force to provide 2 months’ notice of their proposed action.

employees are scheduled to occur on May 14 and May 21, 2018 or within the 13-day periods thereafter.

(The schedule for employment terminations for employees, who are not represented by a union, will occur on starting on March 15, 2018; March 30, 2018; May 7, 2018; May 14, 2018; May 21, 2018; June 30, 2018; and September 30, 2018, or within the 13-day periods thereafter.)

The cover letter to the notice also mentioned Respondent’s planned schedule for the layoffs, stating:

Currently we anticipate the service reduction and position eliminations to occur beginning on/around May 7th and conclude on/around June 2nd and will impact approximately 87 bargaining unit employees.

The notice lists the names and titles of 87 individual bargaining employees, along with their expected layoff dates, with the earliest group slated for discharge between May 7–20. Essentially, the notice indicates that, while the upcoming layoff would first impact nonbargaining unit positions (on March 15), Respondent would then commence laying off bargaining unit employees on May 7, while other nonunit positions remained active. Respondent’s notice did not identify any PRN employee(s) subject to layoff, nor did it disclose whether the nonunit positions left intact as of May 7 would include one or more PRNs. By its cover letter to the notice, Respondent invited the Union to engage in effects bargaining over the layoff. (GC Exh. 3; Tr. 126.)

On March 9, Jordan communicated via email with Respondent’s outside counsel, Patrick Scully (Scully), to set up an in-person meeting regarding the impending layoffs.⁶ During this exchange, Jordan alerted Scully to the language of CBA article 5.1, providing that PRN employees would be laid off prior to regular part-time or full-time employees. Referring to the WARN notice, he added, “[t]hey have bargaining unit employees on the layoff list and they have PRN employees who are not on the list.” Scully’s response was perplexing, to say the least; rather than addressing the potential inconstancy between Respondent’s WARN Notice and article 5.1, he simply stated, “[t]here are no PRN’s in the bargaining unit.” (GC Exh. 4.)

3. The Union’s March 12 information request

The parties agreed to meet to discuss the layoffs on March 14. Two days earlier, Jordan and Scully engaged in an additional email exchange about the order of layoffs, initiated by Jordan, who stated:

I would like to discuss the Company’s plan to follow by the CBA, by insuring PRN, temporary and special part-time positions will be laid off before any regular part-time or regular full-time employees, as well as any other effects

⁶ Attorney Scully, who represented Respondent at the hearing in this matter, did not testify. Based on the record as a whole, I find that the General Counsel has established that Scully, at all relevant times, acted as an agent of Respondent within the meaning of Sec. 2(13) of the Act.

that may affect members of the bargaining unit who are involved in this
layoff.

Minutes later, Scully responded by echoing his prior statement, stating, “I am not sure we
understand your concern, as there are no PRN’s in the bargaining unit (to my knowledge).
Nevertheless, we will certainly hear you out.”

Jordan replied with the following emailed request for information:

Article 5.1 says that PRN’s (among others) will be laid off before any regular
part-time or regular full-time employees.

As such, the union requests a list of all PRN employees who perform work
that would otherwise be bargaining unit work. The Union also requests a list
of all non-bargained for employees who are to be laid off and the amounts of
severance that each will receive.

Our meeting on Wednesday will be more productive if this info can be sent to
us before the close of business on Tuesday, March 13, 2018.

Thank you for your prompt attention to this request.

(GC Exh. 5.) With respect to his request for severance amounts, Jordan did not reference the
contract’s severance parity provision, article 11, but testified that his request was aimed at
“policing” that provision. (Tr. 56.)

It is undisputed that, as of March 12, Respondent had not actually laid off, or made severance
payments to, any employees and Jordan had no factual basis to conclude that Respondent
planned to pay any unit employee less severance than any nonunit employee. Instead, as Jordan
admitted at hearing, his request for the nonunit severance information was based on his suspicion
that Respondent would not meet its severance parity obligation as set forth in article 11. (Tr.
100–107, 114–115.)

4. Respondent’s initial response to the information request

Three minutes after receiving the information request, Scully responded:

You don’t have the right to non-bargaining unit employee information
That language would apply if you had PRN’s in the unit, which you don’t.

See you Wednesday.

Id. at 4.

Half an hour later, Jordan replied as follows:

5 In order to police article 11, paragraph 2, the Union respectfully requests a list of all non-bargained for employees who are to be laid off and the amounts of severance that each will receive.

Article 5 does not specify that the referenced PRN's (to be laid off first) are in the bargaining unit.

10 Id. at 4. Minutes later, Scully emailed back, "What is your claim regarding jurisdiction over non-bargaining unit employees? Please set forth the SPECIFIC legal basis for your request. Please do so in writing." Id. at 3–4.

Twenty minutes later, Jordan emailed:

15 The requested information will allow the union to ensure that financial benefits spelled out in article 11 of the CBA, are honored. As such, it should be considered a presum[p]tively relevant request.

20 However, to further demonstrate the relevance, I will refer you to the language in article 11, which was mutually agreed to by the parties. There is no other way for the union to effectively carry out our statutory duty to represent those within the bargaining unit, without the requested information.

25 Id. at 3.

Scully responded 6 minutes later:

30 I disagree with your analysis. I don't believe your position is supported by the relevant authority.

I further find your last-minute tactics a little disheartening.

35 I look forward to any appropriate case citation supportive of you[r] claims.

Id. Following receipt of this email, at 6:56 p.m., Jordan filed the original unfair labor practice charge underlying this matter. (GC Exh. 1(a).)

40 Forty-five minutes later, Scully sent Jordan an additional email, reiterating that Respondent planned to attend the scheduled meeting on Wednesday. He added, "[a]s you know, SMC's severance policy is straightforward and provides any/all information you need to conduct [] an intelligent conversation." (GC Exh. 5 at 2.) Jordan responded that he was "unaware of the employer's policies (severance or otherwise) as we do not negotiate policy," to which Scully responded, "[y]our Union President has a copy of the policy, but we will bring a copy on
45 Wednesday. That will provide a full response to your request." Id. at 1.

The following morning, Respondent’s director of human resources, Timea Kennedy (Kennedy), sent Jordan a copy of a policy entitled, “Workforce Reduction,” dated effective July 30, 2014. The policy affords Respondent discretion in awarding severance, setting forth a year-of-service based formula under which employees “may” be awarded severance amounts in exchange for a release of claims against Respondent. Scully, who was copied on Kennedy’s email, followed up with an email to Jordan indicating that “the calculation of severance” set forth in the policy constituted a response to his information request. (GC Exh. 6.)

5. The parties’ March 14 meeting

On March 14, the parties met as scheduled and discussed, in Jordan’s words, “how the layoff was going to go forward.” They also talked about the March 12 information request, and Jordan accused Respondent of violating article 5 of the contract by failing to lay off any PRNs. Scully denied that Respondent was in breach, and further stated that the Union was not entitled to a list of PRNs performing the same type of work as represented employees because PRNs “were not a part of the Union.” During the meeting, a Respondent official provided Jordan with an updated copy of the workforce reduction policy Scully had provided the day prior; this version contained the same severance formula as its predecessor but stated that it was effective January 9, 2018. When Scully again characterized the policy as a response to the Union’s third information request, Jordan protested that the policy was, by its terms, discretionary, in that it merely indicated amounts that “may” be received by Respondent’s nonrepresented workforce. (GC Exh. 7; Tr. 62–69.)

Later that day, Scully emailed a letter to Jordan and the Union’s outside counsel, William Reinken (Reinken). Referring to the Workforce Reduction policy, Scully stated that, “at the time of separation due [to] this re-organization, bargaining unit employees will be eligible for severance as set forth in the policy.” He further stated:

We are aware that you seek information regarding non-bargaining unit employees, which, as we have informed you, are not subject to a common set of layoff criteria. Further, non-bargaining unit employees are not subject to the collective bargaining agreement. We have yet to hear any credible explanation for why you believe non-bargaining unit employee information is relevant to the Union’s role. If you wish to present such an explanation, we will consider your argument.

(GC Exh. 8.)

6. The parties’ final round of correspondence

On March 28, Reinken responded to Scully’s post-meeting correspondence, explicitly stating that the Union’s information requests, as set forth in Jordan’s March 12 email, were relevant to the Union’s role as bargaining representative because they “arise out of rights and obligations expressly set forth in the parties’ collective bargaining agreement (e.g., articles 5 & 11).”

The following day, Scully responded. With respect to the Union’s request for severance amounts received by nonunion employees, Scully referred to his March 14 comment about

bargaining unit employee severance being determined by Respondent’s workforce reduction policy. He then characterized the Union’s claims regarding article 5 as “unsubstantiated and false,” in that it had failed to provide “any specific articulation of how [the Union] contend[s] Article 5 has been violated.” Id. Scully then reiterated his position that the CBA did not apply to employees outside the bargaining unit and concluded his letter with the following item-by-item response to the Union’s original, March 12 request:

(1) A list of all PRN employees who perform work that would otherwise be bargaining unit work:

Response: There are no such PRN employees. SMC further objects insofar as the Union is seeking information regarding non-bargaining unit employees without basis.

(2) A list of all non-bargained for employees who are to be laid off.

Response: Please define the term “non-bargained for employees”. SMC objects insofar as the Union is seeking information regarding non-bargaining unit employees without basis.

(3) The amounts of severance that each laid off, non-bargained for employee will receive.

Response: See response to Request 2. Additionally, this information was provided to the Union.

(GC Exh. 18.) Reinken responded on May 1, explaining (as had Jordan previously), that the Union was seeking a list of nonbargained for employees, because it believed that Respondent was required, pursuant to article 5, to lay off certain of those (i.e., PRN) employees prior to laying off bargaining unit members. Per Scully’s request, he provided a definition of “non-bargained for employees” as including “any and all employees of the Company who are not covered by the parties’ current CBA.” (GC Exh. 9.)

It is undisputed that, other than copies of its workforce reduction policy, Respondent never provided the Union with any documents in response to its information requests. (Tr. 92.)

Analysis

The General Counsel alleges that, since March 12, Respondent has failed and refused to provide the information requested by Jordan’s email of that date, as reiterated by Reinken’s March 28 email, namely: (1) a list of any PRNs that otherwise perform bargaining unit work; (2) a list of nonunit employees that are being laid off; and (3) a list of the amounts of severance each nonunit employee received.

1. The General Counsel’s motion to reconsider

By its posthearing brief, the General Counsel asks me to reconsider two of my rulings on the record. First, I rejected the General Counsel’s proffer of certain grievances, and accompanying testimony, filed on March 29, one day after the Union’s second (and final) information request. Second, I denied the General Counsel’s motion to amend the complaint to allege Attorney Reinken’s May 1 letter (discussed supra) as an additional request for information, thereby deeming the March 29 grievances relevant. I stand by my rulings on these issues. That the Union filed grievances after its last alleged information request cannot operate to grant them some form of retroactive relevance. See *Lansing Automakers Federal Credit Union*, 355 NLRB 1345, 1345 (2010) (whether party unlawfully refused to provide requested information “is to be determined by the facts as they existed at the time of the request...subsequent events have no impact on our finding of a violation”). Nor do I find it fair or appropriate to allow an 11-hour amendment to allege a new information request without any showing that the General Counsel was previously unaware of the operative facts underlying the proposed amendment.

2. The duty to provide extra-unit information

It is axiomatic that, pursuant to Sections 8(a)(5) and 8(d) of the Act, an employer must provide a requesting union information necessary for the performance of its duties. While information concerning terms and conditions of employment of employees represented by a union is generally presumed relevant to the union in its role as a bargaining representative, information pertaining to nonunit matters may also be necessary for a union to fulfill its representative duty. This applies to information necessary “not only for collective bargaining but for grievance adjustment and contract administration.” *Centura Health St. Mary-Corwin Medical Center*, 360 NLRB 689, 692 (2014) (citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Wisconsin Bell, Inc.*, 346 NLRB 62, 64 (2005)). As such, an employer may not refuse to furnish extra-unit requested information solely on the basis that it concerns matters outside the scope of the bargaining unit represented by the union. *NLRB v. Acme Industrial*, 385 U.S. at 436; *Curtiss-Wright Corp., Wright Aeronautical Division v. NLRB*, 347 F.2d 61 (3d Cir. 1965), enfg. 145 NLRB 152 (1963).

Information regarding an employer’s nonunit employees may certainly be relevant to a bargainable issue and therefore to the union’s performance of its representative obligations. See *Curtis-Wright Corporation*, supra; see also *General Electric Co.*, 199 NLRB 286 (1972). This may result from the employer placing nonunit terms and conditions at issue during bargaining. For example, in *Harmon Auto Glass*, 352 NLRB 152, 152 (2008), reaff’d. 355 NLRB 364, 364 fn.3 (2010), the Board found that a union was entitled to learn the dollar amount contributed by the employer’s non-union employees towards their health care insurance, after the employer proposed that unit employees contribute an equal amount. Likewise, where an employer has agreed to a contractual “parity” provision (i.e., one which guarantees unit employees a term or benefit equal to that of its non-union workforce), that employer is correspondingly obligated to provide the union with extra-unit information sufficient to verify its compliance with that contract provision. See *East Tennessee Baptist Hospital*, 304 NLRB 872 (1991).

The Board has also found contractual provisions governing layoff situations to justify a demand for nonunit employee information. For example, in *S&W Motor Lines, Inc.*, 236 NLRB 938 (1978), the Board found that a union was entitled to layoff notices issued to individual nonunit employees where the union contended that they had received layoffs on more preferable terms than their union counterparts, in violation of an antidiscrimination provision contained in the collective-bargaining agreement. See *id.* at 950–951 & fn. 22.

3. The relevance burden

As noted, where an information request seeks extra-unit information, the relevance of the request is not presumed but must be shown. *Disneyland Park*, 350 NLRB 1256, 1258 (2007). This means that the General Counsel must present evidence that either: (a) the union demonstrated relevance of the nonunit information, or (2) the relevance of the information should have been apparent to the respondent under the circumstances. *Id.* (footnote omitted); see also *Teachers College, Columbia University v. NLRB*, 902 F.3d 296 (D.C. Cir. 2018), *enfg.* 365 NLRB No. 86 (2017).

The burden to establish relevance is not a heavy one; the Board uses a broad, discovery-type standard, requiring only that the union demonstrate “more than a mere suspicion of the matter for which the information is sought.” *Racetrack Food Services, Inc.*, 353 NLRB 687, 699 (2008) (citation omitted), *reaffd.* 355 NLRB 1258, 1258 (2010); see also *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011). The requesting party satisfies this burden by demonstrating its reasonable belief for requesting the information, supported by objective evidence. *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977); *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

When a party requests information to assist in policing the parties’ contract, the Board requires that it make an initial, but not burdensome, showing of relevance. At a minimum, the party must identify specific contractual language it seeks to enforce, not merely “concoct some general theory” that the requested information “would be useful in determining some unknown contract violation...” *New York Times Co.*, 270 NLRB 1267, 1275 (1984). That said, the requesting party certainly is not required to rely on proof sufficient to *establish* the violation—a standard that would render the right to request information illusory indeed—instead, it must merely show that it had a “reasonable belief that enough facts existed to give rise to a reasonable belief” in the violation. *Walter N. Yoder & Sons, Inc.*, 754 F.2d 531, 536 (4th Cir. 1985), *enfg.* 270 NLRB 652 (1984); see also *New York Times Co.*, 270 NLRB at 1275 (“to require an initial, burdensome showing by the union before it can gain access to information which is necessary to determine if a violation has occurred defeats the very purpose of the ‘liberal discovery standard’ of relevance which is to be used”). Nor must the requesting party be shown to have been correct in its belief; indeed, the Board’s standard for relevance in no way involves an assessment of the merit of any potential grievance. See *Acme Industrial*, 385 U.S. at 437–438; see also *Racetrack Food Services, Inc.*, 353 NLRB at 699–700 (even where its accretion claim ultimately failed, union was entitled to names and addresses of nonunit employees in support thereof).

4. The Union was entitled to the requested layoff and severance information

As the Board has long recognized, the order and manner of layoffs of employees is undeniably “one of the most important aspects of the employer-employee relationship and employees’ rights under their collective-bargaining agreement.” *AT&T Services, Inc.*, 366 NLRB No. 48, slip op. at 6 (2018) (union entitled to information relevant to contractual layoff protections) (citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981); *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)). That the requested information concerns nonunit employees does not render it immune from this aspect of the bargaining obligation. For example, where a contract provides for equal treatment between unit and nonunit employees in areas such as pay and attendance:

The [u]nion is entitled to information which would enable it to examine whether the contract is being obeyed. Only by knowledge as to how [r]espondent is treating nonunit employees may the [u]nion oversee compliance with those contract provisions requiring equal treatment for unit employees.

East Tennessee Baptist Hospital, 304 NLRB at 884.

In this matter, Respondent’s obligation to provide the requested information arose out of its contractual commitments and subsequent course of conduct. After agreeing to articles 5.1 and 11, which placed nonunit employees’ layoffs and severance amounts directly at issue, Respondent informed the Union that it planned to layoff both unit employees and unrepresented employees and indicated in its WARN notice that it would layoff certain unit employees before it laid off other, unspecified nonunit employees. Then it invited the Union to engage in effects bargaining over the upcoming layoff. These actions brought into play the language of CBA articles 5.1 and 11; how could the Union engage in intelligent effects bargaining without knowing whether Respondent intended to abide by these contractual obligations?

Respondent’s initial response to the Union’s expressed concerns did nothing to alleviate them. Instead of indicating whether it intended to comply with the relevant contractual provisions—the order of layoff mandated by article 5.1 and the pledge of severance parity as codified in article 11—Respondent’s counsel Scully obfuscated, appearing to maintain that they simply did not apply and thus the Union was not entitled to the extra-unit information it requested. Specifically, Respondent—at least in its correspondence with the Union—appears to claim that the reference to “PRN” employees in arts. 5 and 11 meant only those PRNs who were represented by the Union, that no such employees existed, and therefore that the articles had no application to the upcoming layoff, rendering the nonunit employee information irrelevant. Whatever the merits of this argument, it did not relieve Respondent of its obligation to provide information sufficient for the Union to pursue a claim to the contrary.

In sum, unlike the cases cited by Respondent, the Union in this matter did not merely posit an unspecified, potential contract violation as the basis for requesting information. Rather, enough facts existed to give rise to a reasonable belief on the Union’s part that upcoming effects bargaining would involve—and indeed be premised upon—Respondent’s intention to abide by articles 5.1 and 11. Moreover, I find that the Union’s requests were triggered by a reasonable

concern, validated in part by Respondent’s own gamesmanship, that Respondent interpreted these provisions as inapplicable to the upcoming layoff. As Jordan informed Respondent’s counsel, the Union disagreed and sought to police the relevant contractual language; his requests themselves were narrow and targeted towards that end.

5. Respondent’s “relevance” defense

Respondent’s defense, as presented by its posthearing brief, appears to have shifted away from a claim that the Union was categorically unentitled to information regarding nonunit employees slated for layoff. Arguably conceding by implication that the nonunit information requested by the Union did have potential bearing on the operation of articles 5 and 11, Respondent now urges that this relevance had not, in effect, “ripened,” in the sense that no layoffs had occurred at the time the information was requested.⁷

I cannot agree. An employer that announces upcoming layoffs affecting unit employees becomes obligated to provide requested information sufficient to allow its bargaining partner to police bargained-for layoff terms and engage in intelligent bargaining over the layoffs’ effects. An employer may not simply announce that layoffs are forthcoming and then, pending their implementation, ignore requests for information related to them. See, e.g., *Florida Steel Corp.*, 235 NLRB 941, 942 (1978) (pending run-up to announced layoffs, employer unlawfully failed to provide requested policies regarding transfer and recall of employees to be laid off); see also *AT&T Corp.*, supra (union entitled to information required to evaluate members’ rights in the event of a layoff). Certainly a union facing layoff effects bargaining is entitled to know whether the layoff, once implemented, will violate contractual terms agreed to by the employer.

It is true that, where CBA language forbids certain employer conduct (i.e., subcontracting) solely where it results in unit employees being laid off, the obligation to provide extra-unit information (i.e., about the subcontracting) may be found triggered only once a layoff has actually occurred. See *Disneyland Park*, 350 NLRB 1256, 1258 fn. 5 (2007). Such a scenario, however, is fundamentally different from the one presented here, in which an employer, having agreed to lay off unit employees in a certain order and pay them specified severance amounts, announces that it will, in fact, implement layoffs and expects the union to bargain over their effects. In such a case, the employer (here, Respondent) is obligated to provide requested information necessary for its employees’ bargaining representative to assess whether those employees’ contractual layoff protections will be honored.

Accordingly, I find that Respondent violated the Act as alleged.

⁷ The General Counsel argues that this amounts to a prematurity argument, which Respondent effectively waived by not asserting it prior to the issuance of the complaint underlying this matter. I disagree. While I do conclude that Respondent, via its counsel, displayed more guile than frankness in its responses to the information requests, I also find that it did—on at least one occasion—accuse the Union of failing to demonstrate how the contract had in fact been violated. Under the circumstances, I do not believe that Respondent may be properly viewed as fully waiving its defense to this case.

CONCLUSIONS OF LAW

1. Respondent Centura Health/St. Mary-Corwin Medical Center (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Communications Workers of America, Local 7774 (the Union) is a labor organization within the meaning of Section 2(5) of the Act with 9(a) status under the Act.

3. At all material times, the Union has been the designated exclusive collective-bargaining representative of the following bargaining unit of Respondent's employees:

The employees within the job classifications set forth in the November 11, 1974, Certification of Representatives of the Regional Director, Region 27, of the National Labor Relations Board in Case Number 27-RC-4900, excluding PRN positions/classifications, "PRN" shall be defined as non-benefited employees working on an as needed basis, not to be confused with those employees working in benefited positions out of the internal St. Mary Corwin Float Pool; excluding all office clerk employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

4. Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to supply the following information, so as to enable the Union to discharge its function as statutory representative of the Unit employees or, to the extent such information did not exist, failing to so inform the Union:

- (a) a list of any PRNs that otherwise perform bargaining unit work;
- (b) a list of non-unit employees that are being laid off; and
- (c) a list of the amounts of severance each non-bargaining unit member received.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Sections 8(a)(5) and (1) of the Act, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Therefore, I shall recommend that Respondent, having unlawfully failed and refused to provide relevant information to the Union that is relevant and necessary to its performance of its duties as exclusive collective-bargaining representative and/or failed to inform the Union that certain requested information did not exist, should be ordered to supply the requested information, set forth above, to the Union, or to the extent such information does not exist, make such representation to the Union. In addition, the Respondent shall post an appropriate informational notice, as described in the attached appendix.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

Respondent Centura Health/St. Mary-Corwin Medical Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to provide information to Communications Workers of America, Local 7774 (the Union) that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

The employees within the job classifications set forth in the November 11, 1974, Certification of Representatives of the Regional Director, Region 27, of the National Labor Relations Board in Case Number 27-RC-4900, excluding PRN positions/classifications, "PRN" shall be defined as non-benefited employees working on an as needed basis, not to be confused with those employees working in benefited positions out of the internal St. Mary Corwin Float Pool; excluding all office clerk employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union, in a timely and complete manner, the following information, or, to the extent such information does not exist, so inform the Union:

- (1) a list of any PRNs that otherwise perform bargaining unit work;
- (2) a list of non-unit employees that are being laid off; and
- (3) a list of the amounts of severance each non-bargaining unit member received.

(b) Within 14 days after service by the Region, post at Respondent's Pueblo, Colorado facility copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed its operations in Pueblo, Colorado, Respondent shall duplicate and
5 mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at its Pueblo, Colorado facility at any time since March 12, 2018; and

(c) Within 21 days after service by the Region, file with the Regional Director for Region 27 a sworn certification of a responsible official on a form provided by the Region
10 attesting to the steps that Respondent has taken to comply.

Dated: Washington, D.C. January 9, 2019



Mara-Louise Anzalone
Administrative Law Judge

APPENDIX A

ARTICLE 1

RECOGNITION AND DEFINITIONS

1.1 The Employer recognizes the Communications Workers of America only for the purpose of Section 9(a) of the National Labor Relations Act as the exclusive bargaining agent for the employees within the job classifications set forth in the November 11, 1974, Certification of Representatives of the Regional Director, Region 27, of the National Labor Relations Board in Case Number 27-RC-4900, excluding PRN positions/classifications, "PRN" shall be defined as non-benefited employees working on an as needed basis, not to be confused with those employees working in benefited positions out of the internal St. Mary Corwin Float Pool. Other than Southern Colorado Family Medicine (SCFM) 902 Lakeview Ave., all employees with positions/classifications covered by this bargaining agreement who are not employed at the Hospital located at 1008 Minnequa Avenue are excluded from the bargaining unit.

1.2 For purposes of this Agreement, a regular full-time employee is one who is hired to work at least 70 hours per pay period. A regular part-time employee is one who is hired to work at least 40 hours per pay period. If an employee has been hired to work less than 40 hours per pay period, but works more than 40 hours per pay period for fifteen (15) consecutive weeks, their status will be modified accordingly. An employee hired to work a part-time position may be assigned to work full-time until that employee's director, manager, or supervisor feels that the new employee has been appropriately trained. The period of training may vary depending on the unit or department to which the employee is assigned, but shall not exceed sixty (60) days without mutual agreement of the Local Union and the Hospital, which agreement shall not be unreasonably withheld.

* * *

ARTICLE 5

LAYOFFS, RECALLS AND FLEXING

5.1 LAYOFFS AND RECALLS: PRN, temporary and special part-time positions will be laid off before any regular part-time or regular full-time employees. For the purposes of layoffs (including temporary layoffs) and recalls within the bargaining unit, departmental seniority in the job title shall govern provided that the ability, competency, skill, efficiency, and the attendance record of the employees are substantially equal.

5.2 SENIORITY AND BUMPING: If an employee transfers from one department to another, he/she will carry his/her total Hospital seniority to that department as part of his/her departmental seniority, provided the employee has been in the most recent department and job title for a period of at least two (2) years. If the employee has not been in the department and job title for a period of at least two (2) years, that employee may use his/her total Hospital seniority to bump into a department and job title where he/she most recently worked, subject to the conditions set forth in Section 5.1. Employees will not be allowed to bump into a higher rated

job title but employees may be allowed, subject to the provisions of 5.1, to bump an employee with ninety (90) days or less Hospital seniority in an equivalent or lower rated job title in their current department.

5.3 TEMPORARY LAYOFFS: The parties recognize the necessity of temporary layoffs due to breakdowns, shortage of materials, or causes of like nature, or causes beyond the control of the Employer. It is therefore mutually agreed that such temporary layoffs may be made from time to time. It is understood that such temporary layoffs shall not exceed sixty (60) consecutive working days.

5.4 RECALLS: Laid off employees shall be recalled in inverse order of layoff providing the job to which they are to be recalled still exists. Laid off employees shall be allowed to bid on job vacancies within the one-year period of recall. Employees on layoff for a period of more than one year have no right to recall. Seniority will not continue to accrue after ninety (90) days of layoff.

5.5 NOTICE OF RECALL: A certified letter will be sent to the employee's last known address. The employee will have five (5) business days from the date of mailing to contact Human Resources, and arrange a date to report to work. If the employee fails to contact Human Resources within the five (5) business days, or fails to report to work as agreed, the employee shall be deemed terminated.

5.6 FLEXING: When the Employer determines that reduction of hours will be accomplished through flexing, pool and part-time employees will be flexed first. If further flexing is needed, volunteers may be solicited from regular full-time and regular part-time employees. Volunteer(s) will be notified by management if Paid Time Off (PTO) is available for the flexing period.

5.7 Notwithstanding any other provision of this Article, if a government or regulatory agency or the JCAHO forces a department or specific operation to close, the seniority provisions as stated in this Article shall not apply, but the Union and the Employer will meet and discuss the impact of such closure on the employee(s) affected.

* * *

ARTICLE 11

GROUP BENEFITS

Except as otherwise specified in this Agreement, the employees in the bargaining unit will receive the same benefits as other regular non-bargaining unit employees of the Hospital. Union PTO benefits are defined in Article 12 of this Agreement.

Union employees will receive the same severance as other regular non-bargaining unit employees of the Hospital capping at twelve (12) weeks. If offered a position within a thirty (30) mile radius and at least 80% of their current wage, no severance will be offered. Severed employees will be required to sign a waiver and release form.

APPENDIX B

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically,

WE WILL NOT fail or unreasonably delay to provide information to Communications Workers of America, Local 7774 (the Union) that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of its employees in the following appropriate unit (the unit):

The employees within the job classifications set forth in the November 11, 1974, Certification of Representatives of the Regional Director, Region 27, of the National Labor Relations Board in Case Number 27-RC-4900, excluding PRN positions/classifications, "PRN" shall be defined as non-benefited employees working on an as needed basis, not to be confused with those employees working in benefited positions out of the internal St. Mary Corwin Float Pool; excluding all office clerk employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL furnish to the Union, in a timely and complete manner, the following information:

- (1) a list of any PRNs that otherwise perform bargaining unit work;
- (2) a list of non-unit employees that are being laid off; and
- (3) a list of the amounts of severance each non-bargaining unit member received.

To the extent such information does not exist, WE WILL inform the Union of that fact.

(Employer)